No. 9817

# United States
# Circuit Court of Appeals
## For the Ninth Circuit

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ISIDORE WINKLEMAN, alleged bankrupt,
*Appellant,*

vs.

T. OGAMI, MESAL BAG COMPANY, PORTLAND BAG AND METAL COMPANY and ENKE'S CITY DYE WORKS, INC.,
*Appellees.*

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# Appellant's Reply Brief

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Upon Appeal from the District Court of the United States, for the District of Oregon.

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*Attorney for Appellees.*



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## AUTHORITIES CITED



## STATUTES

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In the appellant's opening brief (Page 6) the question involved in the present appeal was presented and while the appellees in their opening statement apparently agree with the statement as to the issue involved as appears in the appellant's brief, the arguments advanced in the appellee's brief confuses the issue to some extent. The issue involved herein, simply stated, is whether or not a creditor who has received a voidable preference *can be counted* in an involuntary petition as one of the petitioning creditors

without surrendering or offering to surrender the preference received by him. The appellant in his opening brief has not questioned the right of such a creditor to join in the petition but the attack is made upon his qualification to be counted as one of the required number of petitioning creditors under the statute. In other words, appellant contends that if without counting a creditor who has received a voidable preference and who has not offered to surrender or return the preference in the petition, the number of creditors who have joined in the petition is less than three as required under Section 59b, then the petition must fail.

It is true, as contended by appellees, (Page 4, appellees' brief) that there is no provision of the Bankruptcy Act which expressly terminates the jurisdiction of the bankruptcy court to enter an order of adjudication upon failure of the petitioning creditor to surrender his preference. However, upon a reading of Section 59b of the Act it is clear that there must exist "three or more creditors" before the court has jurisdiction to entertain the petition, and under Section 59e it is further provided:

(Parenthetical matter and emphasis ours.)

> "In computing the number of creditors of the bankrupt for the purpose of determining how many creditors *must join in the petition,* (before the court has jurisdiction) there shall not be counted * * * * * *
>
> (5) creditors who have received preferences, liens, or transfers void or voidable under this Act."

The appellees have not cited any direct authority in their brief that was rendered prior to the enactment of the Chandler Act Amendment which in any manner conflicts with the rule adhered to in the many authorities cited in appellant's opening brief (Page 7, appellant's brief) upon the issue involved herein. Appellees have attempted to analyze these authorities but in each instance the analysis does not detract from the holdings of the opinions and the rule enunciated therein to the effect that a petitioning creditor cannot be counted in determining whether the required number of creditors have joined in the petition as provided under the Act, if he has failed to surrender or offer to surrender a voidable preference which he has received.

There has been cited, on Page 5 of appellees' brief, *In re Automatic Typewriter & Serv. Co.,* 271 Fed. 1, as appellees' authority upon the issue involved herein. This decision is not in any manner pertinent. It deals with a situation where an involuntary petition had been filed by a creditor who had in good faith obtained an attachment against the alleged bankrupt's property within four months prior to the filing of the petition. Objection was made that the creditor could not file the petition without first releasing his attachment. The facts were (as found in the opinion) that a motion had been made to vacate the attachment, which motion was granted, but a formal

order giving effect to the decision of the court was never entered. Accordingly, the warrant of attachment was not formally vacated at the time of the filing of the petition and the property of the alleged bankrupt was in the custody of the sheriff by virtue of the writ. Furthermore, this authority cites with approval *Stevens v. Nave-McCord Mercantile Co.,* 150 Fed. 71, 17 Am. B. R. 609, which case has been cited by the appellant in his opening brief at Pages 11 and 13. In the foregoing case cited by appellees appears the following extract from the *Stevens v. Nave-McCord Mercantile Co.,* case, supra (italics ours):

> "Such a preferred creditor may present or may join in a petition for an adjudication of bankruptcy. *But he may not be counted for the petition unless he surrenders his preference before the adjudication.*"

It is further submitted that the above mentioned Automatic Typewriter & Service Co. case cited by appellees is not applicable in the determination of the issue involved herein because of the subsequent enactment of the amended Section 59e, Subsection (5), which provides that "creditors who have received preferences, *liens* or transfers void or voidable under this Act" may not be counted in determining how many creditors must join in the petition.

There has been cited also by appellees on Page 14 of their brief the case of *Reed v. Thornton,* 43 Fed. (2d)

813, which case, it is submitted, is not applicable to the issue involved herein. In this decision it was held by this court that a payment by the bankrupt to some of the petitioning creditors after the filing of the petition could not deprive the court of jurisdiction. There can be no argument with this holding for the test is whether or *not at the time of the filing of the petition* the required number of qualified creditors had joined in said petition. Any act on the part of either the bankrupt or a creditor that subsequently disqualifies the creditor would certainly not destroy the court's jurisdiction which became fixed at the time the petition was filed. This is far different from the facts in the present matter because, at the time of the filing of the petition, two of the three required petitioning creditors, who joined in the petition had received voidable preferences and had not offered in the petition to surrender or return such voidable preferences. It is not contended by appellant that these creditors have received any preference subsequent to the time of the filing of the petition, but that the preferences they had received prior thereto which they have not offered to return disqualifies each of them from being counted as one of the necessary three creditors required under the provisions of the Bankruptcy Act.

Appellant in his opening brief contends that the rule established prior to the Chandler Act Amendment to Section 59b and Section 59e was to the effect that a creditor,

who had received a voidable preference, *could not be counted* as one of the required number of creditors without first surrendering or offering to surrender his preference and that said rule was codified by the foregoing amendment to the Bankruptcy Act. Appellees attempt to discount this rule, and the unequivocal provisions of the aforementioned sections of the Bankruptcy Act. It is their contention that these sections of the statute deal wholly with a formula for determining whether there exists less than twelve creditors to justify the filing of the petition by one creditor in lieu of three creditors in accordance with the provisions of the statute. However, upon a careful reading of the statute this argument must fail for Section 59e of the Bankruptcy Act specifically provides:

> "In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition there shall not be counted * * * *
>
> (5) creditors who have received preferences, liens, or transfers void or voidable under this Act."

The foregoing section of the statute does not reveal any limitation on its interpretation to being applicable solely for the purpose of determining what creditors may be counted in order to ascertain whether the alleged bankrupt has more or less than twelve in number of creditors. The foregoing provisions of the statute must be neces-

sarily interpreted as including a statutory qualification for those creditors who join with two or more creditors of an alleged bankrupt in filing a petition. If either or any of the creditors who so join are specifically excluded by the express provisions of Section 59e and there does not remain three creditors who may be counted, when the alleged bankrupt has twelve or more creditors, then the petition must necessarily fail.

Contrary to appellees' contention that the question on appeal is squarely before the appellate court for the first time (appellees' brief, page 2) appellant contends that the issue is settled by Section 59b and Section 59e (5) of the Chandler Act and the numerous sections and cogent reasons appearing therein cited in appellant's opening brief. This is indicated in the case of *Stevens v. Nave-McCord Co.,* supra, an extract from which case discussing the reasons for the ruling appears *In the Matter of Macklem,* 22 Fed. (2d) 426; 10 Am. B. R. (N. S.) 550, as set out on Pages 9, 10 and 11 of appellant's opening brief.

Appellees (appellees' brief, page 7) contend that a creditor receiving a preference seeks no advantage when he joins with other petitioning creditors to have the property of the alleged bankrupt subjected to the jurisdiction of the bankruptcy court and that it makes no material difference whether the petitioning creditor, who has received

a voidable preference, surrenders his preference prior to being counted as a petitioning creditor. This is obviously not the situation. One of the many evils which the Chandler Act and the decisions existing prior to its enactment is intended to remedy was the refusal of a creditor holding a voidable preference to surrender or offer to surrender said preference in the petition. The preferred creditor might, if not compelled to so surrender his preference in the petition, refuse to do so later during the administration of the estate and thereby subject the trustee and the estate to the financial burden and effort of prosecuting the proceedings to set aside the preference. Hence, the question as to whether a petitioning creditor has received a voidable preference is an issue in a proceeding had under an involuntary petition in bankruptcy. It is therefore submitted that the District Court refusal herein to consider whether the appellees had received preferences was clearly error.

Respectfully submitted,

Moe M. Tonkon,

*Attorney for Appellant.*